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No. 97-399

In the Supreme Court of the United States

OCTOBER TERM, 1997

MEHMET SEMIH SIDALI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
DAVID S. KRIS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the court of appeals erred in declining to vacate its judgment after the case became moot.

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OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to dismiss (Pet. App. 1a) is unpublished. The opinion of the court of appeals reversing the grant of habeas corpus relief from the certification of extraditability (Pet. App. 3a-22a) is reported at 107 F.3d 191. The opinion of the district court granting habeas corpus relief from the certification of extraditability (Pet. App. 44a-66a) is reported at 914 F. Supp. 1104. The opinion of the magistrate judge certifying extraditability (Pet. App. 23a-43a) is reported at 899 F. Supp. 1342.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1997. A petition for rehearing was denied on July 24, 1997. Pet. App. 2a. The petition for a writ of certiorari was filed on September 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A United States magistrate judge in the District of New Jersey certified petitioner's extraditability to Turkey, pursuant to 18 U.S.C. 3184 and the applicable treaty,[1] after finding probable cause to believe that petitioner had committed rape and murder in that country. Pet. App. 23a-43a. The district court granted habeas corpus relief from the certification of extraditability. *Id.* at 44a-66a. The court of appeals reversed the grant of habeas corpus relief. *Id.* at 3a-22a. While a petition for rehearing was pending, the Turkish criminal proceedings against petitioner were dismissed, and the magistrate judge granted the government's motion to dismiss the extradition complaint. *Id.* at 68a; see *id.* at 73a-74a. The court of appeals denied petitioner's motion to dismiss the appeal as moot. *Id.* at 1a.

1. In 1971, petitioner was charged in Turkey with the rape and murder of a 15-year-old girl who had been living at his house in Mersin, Turkey. He was acquitted by the three-judge trial court, but the appellate

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[1] Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891, 1981 WL 178195.

court reversed the acquittal.[2] After a retrial, petitioner was again acquitted, but the appellate court again reversed, citing "sufficient and convincing evidence" of petitioner's guilt. Pet. App. 5a-8a.

On December 17, 1976, four days after the appellate court's decision, petitioner applied for a passport. Mistakenly believing that petitioner had been acquitted, the Turkish government permitted him to leave the country. Petitioner has lived in the United States since January 1977. Pet. App. 8a.

The Turkish government issued an absentia arrest warrant for petitioner in March 1977. Pet. App. 28a.

2. On October 31, 1994, the United States filed an extradition complaint, on behalf of Turkey, charging petitioner with rape and murder, which are extraditable offenses under the extradition treaty between the two countries. Pet. App. 9a. A magistrate judge conducted a hearing to ascertain whether there was "evidence sufficient to sustain the charge[s]," 18 U.S.C. 3184, and thus whether petitioner was subject to extradition. Pet. App. 9a. The magistrate judge found that the Section 3184 standard was satisfied on two independent grounds: first, because petitioner had already been convicted of rape and murder by the Turkish appellate court, and, second, because the United States had established probable cause, aside from the conviction, to believe that petitioner had committed the crimes. *Id.* at 10a, 33a-34a, 41a.[3] The

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[2] Under Turkish law, "verdicts of acquittal may be appealed to the Supreme Court of Appeals." Pet. App. 6a.

[3] The magistrate judge noted that the government had shown, among other things, "that the victim lived in [petitioner's] home; that she was raped and strangled; that [petitioner] had the opportunity to commit the crime; that [petitioner] was the only man living in the home at the time;

magistrate judge therefore entered an order of extradition. *Id.* at 10a, 41a.

Petitioner challenged the extradition order by seeking a writ of habeas corpus. Pet. App. 11a. The district court granted habeas corpus relief. *Id.* at 12a, 44a-66a. The court held that the government had failed to establish either that petitioner was actually convicted of rape and murder or that there was probable cause to believe that he had committed those crimes. *Id.* at 12a, 57a-65a.

The court of appeals reversed. Pet. App. 3a-22a. First, the court held that petitioner's Turkish conviction was "*per se* probable cause" to warrant his extradition. *Id.* at 18a. The court rejected petitioner's argument that the Turkish appellate court had merely remanded the case for a third trial on the issue of guilt; instead, the court concluded that the appellate court, consistent with Turkish law, had remanded the case only for the imposition of sentence. *Id.* at 14a-18a. Second, the court held that the magistrate judge's alternative finding—that probable cause existed, aside from the conviction, to believe that petitioner committed rape and murder—was adequately supported by competent evidence in the record. *Id.* at 18a-21a. The court therefore concluded that petitioner "may be extradited" to Turkey. *Id.* at 4a.

3. On April 10, 1997, six weeks after the Third Circuit entered its judgment, a Turkish court "decided to abolish the case against [petitioner] because the statute of limitations has expired." Pet. App. 74a.

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that there was no conclusive proof that anyone else had entered the house; and that blood was discovered on [petitioner's] pajama sleeve shortly after the crime." Pet. App. 34a.

The court's order indicates that petitioner was represented by counsel in that proceeding. See *id.* at 88a-90a. On that same day, petitioner filed a petition for rehearing in the court of appeals. *Id.* at 76a. He subsequently filed a motion to dismiss the appeal as moot.

On May 6, 1997, while petitioner's motion and petition for rehearing were pending in the court of appeals, the Turkish government notified the State Department by diplomatic note that it was "withdrawing its request for the extradition of [petitioner]." Pet. App. 74a. On May 8, 1997, the United States moved to dismiss the extradition complaint against petitioner. *Id.* at 73a. The complaint was dismissed the following day. *Id.* at 68a.

The United States opposed petitioner's motion to dismiss the appeal. Pet. App. 75a-82a. The government acknowledged that the extradition case was moot in light of Turkey's withdrawal of its request for extradition. *Id.* at 80a.[4] Relying on this Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), however, the government argued that "the public interest would [not] be served by a vacatur" of the court of appeals' decision. Pet. App. 81a. The government noted that "[i]t appears" that petitioner's extradition case did not become moot by "happenstance," but because petitioner "affirmatively sought the [Turkish court's] ruling." *Id.* at 77a (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)). The government

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[4] Prior to Turkey's request for dismissal of the extradition complaint, the government argued that petitioner's extradition case was not moot, because further appellate review of the decision was possible in Turkey. Pet. App. 76a.

also contended that petitioner was responsible for delaying the court of appeals' decision by twice moving for extensions of time in which to file his brief. *Id.* at 77a n.3. Thus, the government argued, petitioner was not entitled to dismissal or vacatur of the court of appeals' opinion. See *id.* at 77a, 84a-86a.

In response, petitioner asserted that his extradition case became moot by happenstance, but did not dispute that he had sought the Turkish court's ruling. He claimed that it was merely "the passage of time" that led to the dismissal of the Turkish prosecution on statute of limitations grounds, and that he was not responsible for delaying proceedings in the Third Circuit. Reply Mem. 5.[5] The court of appeals denied petitioner's motion to dismiss in an unpublished order (Pet. App. 1a), and subsequently denied his petitions for rehearing (*id.* at 2a, 67a).

ARGUMENT

Petitioner contends (Pet. 12-16) that the court of appeals erred in denying his motion to vacate the judgment when the case became moot while his petition for rehearing was pending. But no decision of this Court requires vacatur in such circumstances. Nor does the court of appeals' unpublished order give rise to a ripe circuit conflict or otherwise warrant

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[5] In its Opposition to Appellee's Motion to Stay Mandate Pending Rehearing En Banc or Certiorari Petition, filed after petitioner's Reply Memorandum, the government again stated that "the event that * * * mooted [petitioner's] case did not result from happenstance but occurred because of his own litigative efforts in Turkey." Pet. App. 86a. Petitioner has not disputed in his petition for a writ of certiorari that he affirmatively sought the dismissal of the case in Turkey. See Pet. 10-11, 13.

review. And, in any event, this case would not be a suitable vehicle, given its unusual facts and circumstances, to consider any rules of general application regarding vacatur.

1. Petitioner argues (Pet. 12) that *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), required vacatur of the court of appeals' judgment. But *Munsingwear* does not govern this case. In *Munsingwear*, the Court stated that its "established practice" in a federal civil case that has become moot "on its way here or pending our decision on the merits" was "to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. But this case did not become moot "on its way" to the Third Circuit. Nor did it become moot "pending [the Third Circuit's] decision on the merits." It became moot only after the Third Circuit issued its decision. This Court has declined to vacate its own decisions in analogous circumstances. See, *e.g.*, *Robinson* v. *California*, 371 U.S. 905 (1962) (denying request to vacate decision after being informed on petition for rehearing that appellant died before decision was issued).[6]

This Court has made clear since *Munsingwear*, moreover, that vacatur is not automatic, even when a case becomes moot before a decision on the merits. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994) (declining to vacate court of appeals' judgment when case was mooted by settlement after petition for certiorari was granted).

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[6] Cf. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 355 (1997 Supp.) (suggesting that "[t]he most persuasive setting for refusing to vacate a judicial opinion according to the terms of a settlement" is when the settlement occurs "after decision by the court of appeals" rather than when appeal is pending).

The Court noted in *U.S. Bancorp* that "[t]he principal condition to which we have looked" to decide whether to vacate "is whether the party seeking relief from the judgment below caused the mootness by voluntary action," in which case vacatur is ordinarily inappropriate. *Id.* at 24. By contrast, where mootness arises from "happenstance—that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties" —there may be "sufficient reason to vacate." *Id.* at 23, 25 n.3 (internal quotation marks omitted). It appears that this case became moot not because of mere happenstance, but because of petitioner's own successful challenge to the criminal proceedings against him in Turkey. See Pet. App. 77a & n.3, 86a. The case therefore differs from the situation discussed in *Munsingwear* and *U.S. Bancorp* on that ground as well.[7]

2. Petitioner claims (Pet 12-13) that there is a conflict among the courts of appeals over whether vacatur should be ordered when a case becomes moot between the issuance of the decision and the mandate.

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[7] Petitioner asserts (Pet. 11, 15-16) that the INS has taken the position that the Third Circuit's decision bars his naturalization. The letter that he cites, however, said no such thing. See Pet. App. 122a-123a. Rather, the letter simply stated that the INS had recently learned of the Third Circuit's decision, which determined that petitioner had been convicted of rape and murder in Turkey. *Id.* at 122a. The letter said nothing about subsequent events, including the dismissal of those charges against petitioner, and invited petitioner to offer evidence in support of his naturalization application and in opposition to the denial. *Id.* at 123a. The letter thus did not give the Third Circuit's decision preclusive effect. Nor did the letter suggest that vacatur of that decision would affect the INS's administrative determination.

But the conflicting cases on which petitioner relies predate *U.S. Bancorp*, and appear to rest, at least in part, on a broader reading of *Munsingwear* than may be warranted after *U.S. Bancorp*. See *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983); *Clarke* v. *United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc); *Independent Union of Flight Attendants* v. *Pan American World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992) (citing *Clarke*). There is no need for this Court to consider the supposed conflict asserted by petitioner until those circuits have had an opportunity to revisit the issue in light of *U.S. Bancorp*. See *Mahoney* v. *Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997) (suggesting that aspects of *Clarke* "may no longer be good law" after *U.S. Bancorp*). And, in any event, because the court of appeals denied vacatur in this case in an unpublished order without opinion, its action does not give rise to a concrete conflict with the pre-*U.S. Bancorp* decisions.

3. Finally, this case would not be a suitable vehicle to refine the rules governing vacatur, even if any further refinement is warranted so soon after *U.S. Bancorp*. The case arises in unusual circumstances that are unlikely to recur. Petitioner does not cite any other decision involving mootness resulting from similar events. It thus does not appear likely that this case would require the Court to articulate any rules of general application regarding vacatur.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
DAVID S. KRIS
Attorney

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